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In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA and PEACE AND FREEDOM PARTY, et al.,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA and CALIFORNIANS FOR AN OPEN PRIMARY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

Whether California's new blanket primary law – which allows voters of any political affiliation to cross party lines at will and to vote in other parties' primaries – violates the First Amendment rights of political parties to associate and to choose their own nominees.

In the Opposition to the Petition, filed November 3, 1999, Respondents objected to the second Question Presented as not the question faced by the courts below and not properly before this Court. Respondents instead provided for this Court the proper question as characterized by the District Court and the Court of Appeals. Petitioners did not file a Reply Brief to the Opposition and did not object to Respondents' characterization of the second Question Presented. Respondents re-affirm that Question Presented as:

Whether the political parties' interest in limiting candidate selection to their own members is so great that no matter what the State's interest and no matter how the Open Primary Law will work in practice, the blanket primary law is unconstitutional on its face.

PARTIES TO THE PROCEEDINGS

Petitioners are the California Democratic Party, the California Republican Party, the Libertarian Party of California, the Peace and Freedom Party, Art Torres, Kathy Bowler, Paul Jorjorian, Gail Lightfoot, and C.T. Weber.

Respondents are Bill Jones, Secretary of State of California, and Californians for An Open Primary.

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CONSTITUTIONS, STATUTES OR REGULATIONS

This case involves the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, and California's Open Primary Act, an initiative measure (Proposition 198) adopted by California's voters on March 26, 1996. The Open Primary Act provides in relevant part:

> All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation. Cal. Elec. Code § 2001.[1]

[1] All statutory references are to the California Elections Code.

STATEMENT OF THE CASE

A. Introduction.

In 1996 the citizens of California concluded that the closed primary then used to select candidates for public office effectively disenfranchised millions of voters and produced government officials unrepresentative of the electorate at large. The voters overwhelmingly adopted the Open Primary Act allowing for a blanket primary system to enhance the democratic nature of the State's election process and the representativeness of its elected officials. Notwithstanding that Washington and Alaska have used the blanket primary for over 60 years, the petitioners, political parties and officials, now assert that the blanket primary is unconstitutional on its face. To date, every court that has considered this question has concluded that the blanket primary does not violate the First Amendment associational rights of political parties. No court has even intimated that the blanket primary is unconstitutional per se. The courts in this case carefully assessed the potential burden posed to the political parties and then balanced them against the interests of California's voters and citizens. Both the District Court and Ninth Circuit decided that the blanket primary does not violate petitioners' First Amendment associational rights. Opinion, Pet. App. 44a, 85a.[2]

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[2] The Ninth Circuit adopted the opinion authored by the District Court as its own. For ease of reference hereafter, respondents will regularly cite to the Opinion which appears in Appendix A of the Petition for a Writ of Certiorari (Ninth Circuit Court opinion), but shall refer to it as the decision of the District Court. "Pet. App." refers to the petition's appendix;

B. Factual Background.

In the March 1996 primary election, California's voters adopted Proposition 198, an initiative measure entitled the Open Primary Act, changing the state's primary election from a "closed" to what political scientists call a "blanket" primary. Proposition 198 passed overwhelmingly by a vote of 59.51 percent to 40.49 percent. Pet. App. 13a. California's blanket primary allows all voters, including independents, to vote for any candidate for any office regardless of the voter's or candidate's party of registration. § 2001. The top vote-getter of each party goes on to the general election. § 15451. Washington has had a blanket primary continuously since 1935, and Alaska has used a blanket primary since 1947, except for a period from 1960 to 1966. Opinion, Pet. App. 15a. Louisiana employs a variant, wherein the top two vote-getters, regardless of party, proceed to a run-off election. *Id.* By comparison, in an "open" primary any voter may request the ballot for *any* party, but is then limited to candidates from that party on the ballot. Pet. App. 14a-15a.

Prior to 1996, California had a classic closed primary, limited to voters who have registered as members of that party a specified period of time prior to the primary election. Only fifteen states have closed primaries of this kind. Opinion, Pet. App. 14a; Gerber Report, J.A. 111. Eight additional states have a "semi-closed" primary: participation is limited to those who have registered in

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"J.A." refers to the Joint Appendix; and "R.T." refers to the Reporter's Transcript.

the particular party plus independents. *Id.* Twenty-three states have an open primary, where participation is open to all registered voters, regardless of party affiliation. Any voter may select any party's ballot on election day. Gerber Report, J.A. 111.

According to a Los Angeles Times poll, Proposition 198 received a strong majority in every demographic subgroup: sex, age, race, education, political ideology, income, religion, and, most tellingly, party identification. J.A. at 104-106. In particular, 69 percent of Independents, 61 percent of Democrats and 57 percent of Republicans indicated they voted for the initiative, and the District Court found it likely that a majority of the members of minor parties also favored Proposition 198. Opinion, Pet. App. 13a; *also* Quinn, J.A. at 204.

As the District Court noted, California's Open Primary Act continues California's long history of political reforms begun in the Progressive Era. Opinion, Pet. App. 38a; *see* Alvarez & Nagler Report, J.A. 181-183. These reforms, most notably the initiative, cross-filing, and the direct primary, sought to empower citizens over special interests. "The Progressives believed that democracy should be something greater than competition between political parties. They viewed the direct primary as a vital weapon in their battle to 'make government accessible to the superior disinterestedness and honesty of the average citizen. [With the primary] . . . , it would be possible to check the incursions of the interests upon the welfare of the people and realize a cleaner, more efficient government.' [Citation.] We can imagine no government interest more compelling." *Lightfoot v. Eu*, 964 F.2d 865, 872 (9th Cir. 1992). With Proposition 198, California voters ended

the century as they began it: by ensuring that citizens have a greater say over politics.

C. Proceedings Below.

Petitioners sued in early 1997 to enjoin enforcement of Proposition 198, J.A. 4-22, and the matter went to trial in mid-1997. The District Court received extensive expert testimony and documentary evidence from party officials, political scientists, campaign consultants and elections officials regarding the expected operation of California's blanket primary. This was based, in part, on experience in Washington and Alaska. On December 4, 1997, the District Court rejected petitioners' claims and entered judgment for respondents. Pet. App. 85a.

In ruling for respondents, the court rejected the claim that allowing non-party members to vote for candidates identified by their party on the primary ballot renders the blanket primary facially unconstitutional. Pet. App. 22a, 27a. The court noted that twenty-one states utilize open primaries allowing participation by non-party members, *Id.* at 14a, and under the political parties' theory, these primary schemes would also be unconstitutional per se. Rather, the court applied the "flexible" balancing test articulated by this Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), for assessing the potential impact of the blanket primary upon petitioners. Pet. App. 20a-21a. Petitioners asserted that the blanket primary will have a "destructive effect" on California's political parties, with crossover voting and raiding affecting the selection and behavior of nominees and party officials, weakening party discipline, increasing the cost

of primary elections, dampening the morale of party activists and disrupting internal party governance. *Id.* at 28a-29a. The court termed petitioners' characterization "overdrawn," *id.* at 29a, and found that the blanket primary will not diminish the efficacy or strength of political parties in California by "any substantial degree." *Id.* at 35a. The court did note a weakening effect of the party's ability to discipline legislators. Ultimately, the court concluded the blanket primary imposes a "significant but not severe burden on [the parties'] associational rights." Pet. App. 34a, 37a. Accordingly, the court noted that Proposition 198 need only be supported by interests that are important, but not compelling. Pet. App. 37a.

Notwithstanding that the state's interests need not be compelling, the court found those interests are indeed compelling. The court cited the reduction of partisan strife, increasing the representativeness of elected officials, giving voters greater choice and increasing voter turnout and participation in the primary process. Pet. App. 43a.

The Ninth Circuit reviewed de novo the constitutionality of the blanket primary and the District Court's determinations on questions of law and mixed questions of law and fact. *Id.* at 8a. After considering the record and briefs, on March 4, 1998, the Ninth Circuit affirmed and adopted the "careful, detailed and eloquent" opinion of the District Court as its own. *Ibid.*; 169 F.3d at 647-648.

On June 4, 1999, petitioners' petition for rehearing en banc was denied, with no judge on the Ninth Circuit requesting a vote on the petition. Pet. App. 87a. This Court granted certiorari on January 21, 2000.

D. Relevant Post-Trial and Post-Appeal Events.

Subsequent to the decision of the Court of Appeals, on July 13, 1998, the California Legislature proposed a measure to be placed on the ballot to "re-close" the presidential primary election. Resp. Lodging at 5-8. Known as Proposition 3, *id.* at 9-14, the voters rejected the measure 54 to 46 percent. *Id.* at 15-17. Partly as the result of that defeat, the Legislature again proposed a means to by-pass the blanket primary to allow for the selection of delegates for the presidential race according to national party rules. Senate Bill 100, approved and filed May 4, 1999, requires the Secretary of State to forward to the national political parties the results of the presidential race by voters registered in the respective parties. Resp. Lodging. at 1-4.

Elections held in June 1998 and March 2000 were conducted under the blanket primary. Relevant statements of the vote are provided in Respondents' Second Lodging.

SUMMARY OF ARGUMENT

This case presents a simple question: what is the purpose of a primary election? This Court has consistently held that primary elections are an integral part of the democratic process by which public officials are elected to administer government, a fundamentally public activity that narrows the field of candidates facing the voters. Primary elections are *not* the private activity of the political parties, beyond legitimate regulation by the citizens themselves. Because political parties receive

automatic ballot access and party identification for candidates, they are not simply private actors.

By passing Proposition 198, the citizens have asserted their own First Amendment interest in a more representative and participatory system of democratic governance. This case does not pit the parties' own associational interests against the regulatory interests of the state. Rather, it pits interests asserted by the parties' officials against the most fundamental First Amendment interests of party members themselves and of all voters. Strong majorities of every political party, as well as every demographic subgroup, approved the blanket primary. This Court should accord singular deference to the voters' and party members' decision to enhance the democratic process.

The associational interests of political parties are not absolute. *Storer v. Brown*, 415 U.S. 724, 730 (1974); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 204-205 (1996); *Smith v. Allwright*, 321 U.S. 649, 659-660 (1944). Nonetheless, the political parties insist they can restrict candidate selection to voters who publicly affiliate with them – a belief which can only be premised on an unfettered right to limit candidate selection. As a consequence, states would have to run primary elections exactly as the political parties dictate. That defies both logic and common sense, allowing the parties to be the tail that wags the dog. The parties cannot be permitted to restrain the ability of the citizens freely and openly to participate in all stages of the electoral process.

In short, the political parties believe that the blanket primary is *per se* unconstitutional. They lean on this Court's decisions in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214 (1989), and *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981), for the notion that they can select their standard-bearers by whatever means they want. The cases simply fail to support the parties' interpretation. *Tashjian* invalidated a closed primary restricting candidate selection. The blanket primary, by contrast, expands it. *Eu* concerned restrictions on internal party organization, not public elections, and *LaFollette* discussed only whether states could force a national political party to accept convention delegates in violation of its rules. As implemented, California's blanket primary does not run afoul of *LaFollette*: the state provides the national parties with separate tallies for the presidential primary by vote of party registrants.

Instead of a *per se* rule, this Court applies a flexible text whenever a political party claims an election law infringes on its associational interests. Articulated most recently in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the test weighs the "character and magnitude" of an alleged burden against the interests the state contends justify that burden. Regulations imposing severe burdens must be narrowly tailored and advance a compelling state interest; lesser burdens trigger less-exacting review. By this test, the political parties have failed utterly to demonstrate that the blanket primary violates their First Amendment associational interests.

The burdens asserted by the political parties were characterized by the trial and appellate courts as overdrawn, insubstantial or speculative. Theoretical harms, however, cannot be the basis of a facial attack.

The first of these burdens is crossover voting, including so-called "raiding," voting strategically to nominate the other party's weaker candidate. Nearly every expert agreed that "raiding" would seldom occur. The evidence firmly established the vast majority of voters who cross over do so sincerely in order to vote for the candidate they most prefer. The trial also established that crossover voting occurs in both open and closed primaries as well. In these other systems, moreover, crossover voters will cause more harm. Once voters ask for another party's ballot, they are locked into that ballot. They must cast their votes, if at all, among candidates they do not sincerely care for. Additionally, primaries with same-day registration are functionally no different from an open primary. Given the systemic similarities among blanket, open and some closed primaries, the California blanket primary is no more harmful to the political parties' interests than the primary election systems used by over half the states.

The political parties also failed to show that the blanket primary injures any of their traditional activities. Evidence of deleterious effects on party discipline or internal party governance was speculative and remote. Nor was any adverse effect shown on party campaign activities, financial support, registration, platform development and get-out-the-vote activities. Washington State's experience shows that the parties remain vigorous

in blanket primary states. *See, e.g.*, Olson Report, J.A. 138-143.

Additionally, minor parties suffer no special burden because of the blanket primary. Minor parties purport to engage in the primary process for expressive purposes. However, the state-run election process serves to select public officers, not to provide publicly-financed forums for political expression. Both the major and minor parties are free, of course, to completely control their nominating processes as completely private entities.

Turning to the state's concerns, the blanket primary advances numerous compelling interests. It undeniably promotes representative democracy, furthering political stability and governmental legitimacy. By allowing all qualified voters to vote in primary elections without restricting their choice or discriminating based on party affiliation, the blanket primary encourages greater voter participation and guarantees candidates will be more representative of the electorate and more broadly reflect the views of the voters. Indeed, millions of disenfranchised voters, including 1.5 million independents, will be able to vote. Data already show remarkable increases in participation in the first two blanket primary elections in California. The blanket primary also provides more choice for voters, expanded debate, enhanced voter privacy, and greater fairness.

Alone among the different types of primaries, the blanket primary represents the least drastic means available to promote the citizens' profound interests. These

interests – promoting broad-based electoral support of candidates, providing greater representativeness and increasing voter participation – are all, as the District Court put it, "interests of the first order." They aim to nourish democracy itself. Accordingly, this Court should affirm the judgment.

ARGUMENT

I. CALIFORNIA'S OPEN PRIMARY ACT IS A CONSTITUTIONALLY PERMISSIBLE EXERCISE OF THE PEOPLE'S RIGHT TO STRUCTURE THEIR ELECTIONS TO ENHANCE THE DEMOCRATIC NATURE OF THE ELECTION SYSTEM AND THE REPRESENTATIVENESS OF ELECTED OFFICIALS.

> The true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allows.
> – Alexander Hamilton.

U.S. Term Limits Inc. v. Thornton, 514 U.S. 779, 795 (1995) (quoting 2 Elliott's Debates 257, in *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969)).

Hamilton's declaration is as true today as at the country's birth. In 1996 the citizens of California concluded that the "closed" primary used to select candidates for public office left popular elections far from "perfectly pure" and far too "bounded." California's closed primary system effectively disenfranchised millions of voters, producing government officials unrepresentative of the electorate at large. The voters overwhelmingly adopted Proposition 198, enacting a blanket primary to enhance the democratic nature of this State's election process and the representativeness of its elected officials. In doing so, California has joined the ranks of over half of the States of this nation which do not employ the traditional closed primary election.[3]

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[3] Washington, Alaska, and Louisiana have used the blanket primary for the past 50 to 65 years; 23 other states use various forms of the open primary, *see* Gerber Rept., J.A. 111-113; and some states, like New Hampshire, nominally use a closed primary but allow some or all voters to change registration at the polls, N.H. Rev. Stat. Ann. § 654:34(II)(b) (1996), thereby making the closed primary essentially identical to an open or semi-open one. Many of the states holding the earliest and most influential presidential primaries, for example, use one of these alternatives to the traditional closed primary. *See, e.g., id.* (New Hampshire); Va. Code Ann. § 24.2-530 (Michie 1997) (Virginia).

The presidential preference vote in California is subject to different election laws that do not bear directly on the issues in this case. Under §§ 15151, 15375 and 15500, as amended May 4, 1999, California provides presidential election results, including by party preference, to the national parties for their use in selecting national delegates according to their own rules. *See* Resp. Lodging. The focus of this case is on elections for state government offices and the Congress.

A. A Primary Election Is Part of the Public Process of Electing Officers to Administer Government, Not a Private Event.

This case presents two competing views of the role of a primary election. California's view, like that of the twenty-six other states that have adopted open and blanket primary elections, is that a primary is the first, critical step in the electoral process. The function of a primary election is to allow the citizens to choose their public officers, *see United States v. Classic*, 313 U.S. 299, 318 (1941), serving to narrow significantly the field of candidates for office. It is often the only opportunity to cast a meaningful vote. "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the political parties] have been made." *Morse v. Republican Party*, 517 U.S. at 205-206 (opinion by Stevens, J.).

The political parties argue that the primary is the culminating moment in the life of a private group. The parties maintain a primary's function is to pick a candidate who most clearly reflects the ideals of a party – not to elect the office holder or to narrow the field of candidates. On account of this claim they contend today that a blanket primary, and by implication, all open primaries and some closed primaries, are *per se* unconstitutional. However, it is too late in the day to argue that political parties are purely private entities with a right to absolutely control the states' primary elections. As this Court has recognized, "[t]he primary election . . . in California . . . is 'an integral part of the entire election process . . . [that] functions to winnow out and finally reject all but the chosen candidates.' " *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986)

(quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)); *Burdick v. Takushi*, 504 U.S. 428, 439 (1992). Because of the role the State confers upon political parties in the electoral process, a role they have accepted, they are public and governmental actors. Only political parties are given automatic ballot placement for their candidates, and only parties seek, as their ultimate goal, to obtain control of the levers of government. Pet. Brief. at 19.

B. The State's Power to Regulate Elections for Public Office Is a Fundamental Attribute of the State's Sovereignty and Its Democratic Character.

This Court has long recognized that the Constitution grants states "broad power to prescribe the 'Time, Places and Manner of holding Elections for Senators and Representatives,' art. I, § 4, cl. 1, which power is matched by state control over the election for state offices." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.' " *Burdick v. Takushi*, 504 U.S. at 433.

This court should accord particular deference to the voters' enactment in this case.[4] A State's sovereignty is

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[4] While the district and appeals courts did not rest their decisions on this ground, Opinion n.16, Pet. App. at 21a-22a, this Court is in a position to recognize that the political parties' membership approved of the blanket primary by voting for

defined through the structure of its government, particularly how citizens select those to govern. These decisions "go to the heart of representative government." *Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991). Accordingly, the Framers intended for states to keep for themselves the power to regulate elections and prescribe the manner in which officials will be chosen, such power being inherent in the State's obligation to preserve the concept of a "political community." *Sugarman v. McDougall*, 413 U.S. 634, 647 (1973). "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature

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Proposition 198. In fact, 61 percent of Democrats and 57 percent of Republicans voted for the initiative and it is "likely that a majority of the members of [minor] parties also favored the initiative." Pet. App. 13a; J.A. at 104-106; *see also* Quinn, J.A. at 204. The district and appeals courts found these figures from the *Los Angeles Times* poll to be reliable, *id.*, and petitioners have not challenged their accuracy.

Since "[political parties] . . . exist to advance their members' shared political beliefs," *Colorado Republican Campaign Committee v. FEC*, 518 U.S. 604, 629 (1996) (Kennedy, J., concurring in the judgment and dissenting in part) (citations omitted), their associational rights cannot be asserted to defeat their members' will. *Cf. Tashjian*, 479 U.S. at 236 (Scalia, J., dissenting) (recognizing primary as protecting "general party membership against . . . minority control" by party leadership, whose views may "diverg[e] significantly from the views of the Party's rank-and-file"). Just as the voters may override their legislative representatives through the initiative, party members have a right to override their officials through the same mechanism. If in conflict with the position of party leaders, the members' First Amendment right prevails. *Eu v. San Francisco Democratic Central Committee*, 489 U.S. at 226 n.15.

of their own machinery for filling local public offices." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970). It is axiomatic that "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

Moreover, the interests contending in this case are not classically those of the political party versus the State. The State's interests here are directly those of the people, the voters who approved of California's Open Primary Act. The case, then, pits the interests of the political parties against the voters' own First Amendment interests in a democratic system of government. *Elrod v. Burns*, 427 U.S. 347, 372 (1976). The interest of citizens in determining how they elect their government is fundamental. The courts ought not to disregard those interests, expressed through electoral reform, especially when those parties' members have themselves directed otherwise at the polls. The compelling interests of the State in this case spring ultimately from the citizens' own First Amendment interests in effective democratic government.

II. POLITICAL PARTIES DO NOT HAVE AN ABSOLUTE RIGHT OF ASSOCIATION WHEN PARTICIPATING IN PUBLIC ELECTIONS.

Respondents urge upon this Court the wisdom and foresight of the District Court when it carefully characterized the question it faced: *Is the parties' interest in limiting candidate selection to their own members so great that no matter what the State's interest and no matter how Proposition 198 will work, the blanket primary is unconstitutional on*

its face? Under this Court's decisions, the resulting answer must be no.

A. The Political Parties Do Not Have An Absolute Right to Restrict Who Can Vote in Selecting Candidates for Public Office.

The associational interests of political parties are not absolute. *Storer v. Brown*, 415 U.S. at 730. Yet the political parties here suggest that their interests in limiting candidate selection to voters who publicly affiliate with them is just that – absolute – and thus, the blanket primary, because it allows all voters to help select the final candidates, is per se unconstitutional. However, the claim that First Amendment rights may be implicated is the beginning of the inquiry, not the end of it.

The gravamen of the political parties' claim is that the First Amendment *requires* the State to run its primary elections exactly as the parties dictate. In such a regime the parties would be able to overthrow almost any state regulation of primary elections, even rules requiring them to nominate by direct primary, to accept votes from party members that the parties may want to exclude, and to count only registered voters' votes.[5] Courts have

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[5] Such possibilities are not hypothetical. At trial, Gail Lightfoot of the Libertarian Party, testified that: "[i]n California . . . state law says that all registered voters that take the name Libertarian are members of the party. But we consider pledge-signing individuals who have paid their dues and signed the pledge to be the true members of our party." R.T. 154. The parties' reasoning would give the Libertarian Party the right to restrict voting to its "true members." Similarly, the Peace and Freedom Party confers membership on persons who are "deprived of the right to vote by the State of California because of age, citizenship, or prior social behavior." R.T. 179. The logical consequence of this claim is that if the party insists, the State must allow minors, felons and noncitizens to vote in the primary.

already rejected such arguments. *Lightfoot v. Eu*, 964 F.2d 865 (9th Cir. 1992), *cert. denied*, 507 U.S. at 919 (upholding direct primary over party's objection); *Smith v. Allwright*, 321 U.S. 649 (1944) (striking down party's exclusion of blacks from primary). When they engage in the nominating process, established political parties are subject to a wide range of state regulation, *see Morse v. Republican Party*, 517 U.S. 186; *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 157-58 (1978), and do not have unfettered control over who can vote in primary elections, *see Terry v. Adams*, 345 U.S. 461 (1953).

Moreover, such a right would place an unmanageable burden on the states. They would have to tailor primary requirements to every party's wishes. States would have to run a primary election where the Republicans want a completely closed primary; the Democrats a completely open one; the Libertarians, one open to themselves, Independents, and Democrats, but not to Republicans; the Peace and Freedom Party a blanket primary; and still another party a primary open only to members pledging to vote for the eventual nominee. This approach would quickly turn the primary to chaos, particularly when the parties' desires conflict. *Green Party v. Jones*, 31 Cal.App.4th 747, 759, 37 Cal.Rptr.2d 406, 414 (1995) ("Even little variations [in primary procedures], if they are capable of multiplication at the behest of political

parties[,] contain the seeds of an elections procedure Babel.").

B. The Cases Cited by the Political Parties Do Not Support Their Theory of an Absolute Right to Restrict Who Can Vote in Selecting Candidates for Public Office.

The parties cite three Supreme Court cases as supporting this argument, *Tashjian v. Republican Party*, 479 U.S. at 208, *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214 (1989), and *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981). None of these decisions in fact supports the political parties' position.

For example, they quote language from *Tashjian* that refers to the constitutional protection given a political party to "determin[e] the boundaries of its own association" and the "basic function" of selecting the "Party's candidate," suggesting that it is the political party that sets the rules governing who votes in a state's primary election. Pet. Brief at 24-27. Therefore, it is said, Proposition 198 "trenches" on the parties' associational rights. Pet. Brief at 24. In fact, *Tashjian* bolsters rather than undermines Proposition 198.

As the Alaska Supreme Court succinctly put it: "*Tashjian* does not confer *per se* validity on party rules which conflict with a state's primary election laws. Indeed, it disavows any such scope: 'Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership.' 479 U.S. at 224 n.13, 107 S. Ct. at 554

n.13." *O'Callahan v. State of Alaska*, 914 P.2d 1250, 1259 (1996) (upholding Alaska's blanket primary election law).

In *Tashjian*, Connecticut State Democratic officeholders blocked Republican attempts to allow independent voters to participate in the Republican primary. 479 U.S. at 212-213 n.4. In considering whether Democrats could act through the State to bar Republicans from expanding their electoral base, the Supreme Court carefully defined the associational interest at stake. The Republican Party's interest, it held, was not in generally determining who could participate in the selection of its candidates, but specifically in preventing that group of voters from being "limit[ed.]" The Court wrote:

> The [Connecticut] statute . . . places *limits* upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. The state *thus limits* the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

Tashjian, 479 U.S. at 215-216 (citations and footnote omitted) (emphasis added). *See also Timmons*, 520 U.S. at 360 (reiterating narrow scope of *Tashjian* when rejecting a challenge to Minnesota's anti-fusion statute).

Tashjian hardly holds the parties' associational interest to be a sweeping right to control who may vote in primaries. Rather *Tashjian* and *Timmons* identify the interest more specifically as one *against* having the party's electoral base restricted contrary to the party's wishes. As *Tashjian* notes, limiting those to whom the party may

appeal for support impairs the party's "appeal to common principle [which] may be translated into concerted action, and hence to political power in the community." *Tashjian*, 479 U.S. at 216. The interest runs not to the party's right to control who can participate in a critical step of the electoral process, but instead to the ultimate competitiveness of these candidates in the *general* election. The State does not have a right – over a party's objection – to *limit* the range of voters to which a primary candidate can appeal. By opening up the primary, however, Proposition 198 vigorously promotes, not impairs, this interest.

Second, the parties' also cite *Eu*, 489 U.S. 214, which likewise fails to support their claims. In *Eu*, the Supreme Court struck down a statute prohibiting parties from endorsing candidates in primaries and dictating the organization and composition of party governing bodies. The case did not involve who could vote in primaries, but only whether parties could speak to their members and manage their internal organization as they thought best – areas Proposition 198 carefully avoids.[6] Indeed, the Court noted that a party's interest in controlling its internal organization was much different from *and stronger than* the party interests at stake in the primary election in *Tashjian*. *Eu*, 489 U.S. at 230.

Finally, *LaFollette*, 450 U.S. 107, concerns not whether a State may choose a particular primary system over a political party's objection, but only whether a State can

[6] Under Proposition 198, election of party central committees remains limited to voters registered in each party. § 13300.

force a national party to accept convention delegates chosen in violation of the party's rules. *LaFollette*, like *Cousins v. Wigoda*, 419 U.S. 477 (1975), rests heavily on the special nature of national party conventions, which formally govern the party's internal affairs, implicate interests beyond the reach of any individual state, and reflect the need for national uniformity in our one single national race – that for President and Vice-President. This interest of the national parties is not implicated here. Under the California Elections Code, as amended May 4, 1999, presidential primary results by party vote are forwarded to the national parties for national delegate selection according to the national parties' own rules. *See* n.3, above.

Additionally, *LaFollette* did not overturn Wisconsin's open primary law. "The question in this case is *not* whether Wisconsin may conduct an open primary election if it chooses to do so." 450 U.S. at 120 (emphasis added). This Court then noted that the Wisconsin Supreme Court "may well be correct" that "the open primary serve[s] compelling state interests by encouraging voter participation." *Id.* at 120-21. This Court acknowledged Wisconsin has a substantial interest in the manner in which its elections are conducted and that that interest was not incompatible with the national party's interest – both interests could and would be preserved. *Id.* at 126.

C. Instead of Employing a *Per Se* Rule, This Court Has Provided a Flexible Test That Weighs the Burdens on Political Parties' Associational Interests Against the Reasons Justifying the Election Law.

This Court applies a flexible standard of review to state election laws challenged by a political party on the basis of the First Amendment. When deciding whether a state election law violates First and Fourteenth Amendment associational rights, a court:

> weighs the "character and magnitude" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less-exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable nondiscriminatory restrictions." No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (citations omitted) (citing *Burdick v. Takushi*, 504 U.S. at 434; *Anderson v. Celebrezze*, 460 U.S. 780, 788-789 (1983) and *Norman v. Reed*, 502 U.S. 279, 288-289 (1992)). Moreover, the Court does not require "elaborate, empirical verification of the weightiness of the State's asserted justifications." *Id.*

Thus, this Court has *not* employed the *per se* rule urged by the political parties, nor does it routinely apply strict scrutiny whenever a political party alleges its associational interests are impaired by a state's election process. As the District Court noted: "[i]t is necessary to look beyond the parties' claim that their constitutional interest in limiting candidate selection to their respective members necessarily prevails over any State interest and without regard to how the voters may behave under a blanket primary." Pet. App. at 27a.

III. UNDER THIS COURT'S FLEXIBLE TEST, THE POLITICAL PARTIES FAIL TO DEMONSTRATE THE BLANKET PRIMARY VIOLATES THEIR FIRST AMENDMENT ASSOCIATIONAL INTERESTS.

When this Court's test in *Timmons* and *Burdick* is applied, it soon becomes apparent that the political parties' First Amendment rights of association have not been violated. The burdens they alleged were found to be speculative and, in most cases, insubstantial by the District Court; the reasons justifying the blanket primary were found to be strong and compelling; and the blanket primary was found to be the "perfect fit," tailored precisely to meet the compelling interests of the electorate. Pet. App. at 29a-37a, 42a-43a. The parties ignore or minimize the findings of the District Court, because, once this Court's test is employed, they cannot substantiate the constitutional violation they assert.

In the political parties' brief, except as to the minor parties, they fail to present this Court with any of the

burdens or harms they will suffer as the result of the blanket primary, other than to say that the primary is "intrusive into party associational rights because it denies the very existence of those rights." Pet. Br. at 33. In other words, they return to the notion of a *per se* violation. However, respondents will assume for the purposes of this argument that the political parties continue to rely on the harms and burdens they suggested at trial and on appeal. It was clear then, and clear now, that the political parties simply do not suffer the burdens they asserted below as the result of California's Open Primary Act.

A. The Political Parties Assert Burdens That Are Insubstantial or Speculative.

The parties asserted they will suffer a range of harms – from "strategic voting" to impairment of women's and racial minorities' voting power. The District Court found these assertions without any basis in fact and largely rejected them as speculative, falling far short of adequate proof. Opinion, Pet. App. 29a-30a, 32a-33a. In doing so, the court followed the lead of both this Court and other courts. *See, e.g., Timmons*, 520 U.S. at 361 (rejecting speculation and "predictive judgment"); *San Francisco County Democratic Central Committee v. Eu*, 826 F.2d at 832 (rejecting expert's opinion as based upon speculation, not fact). The District Court's finding that the parties offered little evidence that the asserted dangers will occur are findings of fact that should be afforded deference by this Court.

By contrast, respondents presented substantial evidence as to how the blanket primary has operated in Washington for the past 60 years. *See* Olson Report, J.A.

at 138-149; Pet. App. 29a-31a. The political parties refuted none of this evidence. Indeed, at trial, they and their experts repeatedly acknowledged a lack of familiarity with how the blanket primary has operated in Washington and Alaska, the functional experience most relevant to this case. R.T. 62, 192, 226, R.T. 583-584.

1. The Political Parties Demonstrated No Burden from Crossover Voting, Including So-called "Raiding."

The parties failed to prove that "crossover" voting will burden parties. As the court below correctly concluded, "the parties' characterization of the likely amount or effects of crossover voting due to a blanket primary is overdrawn." Pet. App. 29a. A crossover voter is someone who votes for a candidate of a party in which the voter is not registered. Crossover voters have been variously described as "sincere," "strategic" or "raiders." *Id.* at 28a-29a. The parties complain most of the so-called raider, who mischieviously switches sides to vote for the candidate perceived weakest in another party. However, while the parties' witnesses testified at length as to how raiding *might* occur, not a single expert produced any evidence that raiding is in fact a problem in open or blanket primary states. Quite the contrary, their testimony proved how difficult raiding would be.[7]

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[7] Successful raiding requires highly specific electoral conditions, accurate information, secrecy, and the money and means to pull it all off. In particular, the experts agreed that in order for raiding to even be a possibility: (1) the raider's own primary must be uncontested; (2) the race in the opposing party

Given the real-life complexity of political campaigns, the District Court found "almost unanimity" among the experts that there is little evidence raiding will be a factor in California's blanket primary. Pet. App. 29a; R.T. 401, 404, 475, 485-486, 515, 594, 774. This finding confirms the conclusion reached by every court that has addressed the issue. *Tashjian*, 479 U.S. at 219 n.9; *LaFollette*, 450 U.S. at 122 n.23; *O'Callaghan v. State*, 914 P.2d 1250, 1261 (Alaska 1996) (upholding Alaska's blanket primary); *State ex rel. LaFollette v. Democratic Party*, 287 N.W.2d 519, 533 (Wis. 1980), *rev'd on other ground, Democratic Party of the United*

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must be tightly contested; (3) the raider must be able to tell which candidate in the target party will be weakest in the general election; and (4) the raider must be part of a concerted action. *See* Olson Report, J.A. 137; R.T. 518, 425. Each link in this chain is problematic and speculative.

Partisan activists must cross over and vote for a candidate they find most objectionable. R.T. 315. Additionally, it is difficult for even political consultants, let alone voters, to predict accurately in the spring which of several candidates in the target party will be weakest in November. R.T. 338. In 1966, for example, Democratic Governor Pat Brown's advisers thought that Republican Mayor George Christopher would be his strongest opponent in the general election and so did everything they could to help Christopher's opponent in the primary: Ronald Reagan. R.T. 338. The information and analysis required for raiding is generally not available to the average voter. R.T. 545. Finally, any large-scale attempt to manipulate voters is usually quickly disclosed, and then backfires on the manipulators. R.T. 80, 252, 254, 282, 869. Professors Alvarez and Nagler concluded that less than 2 percent of voters ever engage in raiding and that the blanket primary will not lead to large amounts of strategic behavior by voters, most of whom will not have the information necessary to engage in such behavior. J.A. 169-170.

States v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (U.S. Wis. Feb. 25, 1981).[8] The District Court's finding can hardly be overturned as clear error.

The parties' own experts acknowledged that the vast majority of voters who cross over do so simply to vote for the candidate they most prefer. R.T. 451, R.T. 486 (90 to 95 percent of crossover voters are voting for the candidate of

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[8] At trial, expert testimony concerning two Washington elections demonstrated raiding is unlikely to occur. Petitioners' expert Sal Russo was a political consultant to Republican George Nethercutt, who defeated Speaker of the House Thomas Foley in 1994 – the first time a sitting Speaker had been defeated in 50 years. R.T. 310. Russo testified that conditions in this race were "ripe" for raiding: Foley was unopposed and well-financed, and Nethercutt, one of three candidates seeking the nomination, was a relative newcomer but already identified as Foley's strongest potential challenger. R.T. 320-323. However, the Democrats made no attempt to raid the Republican primary and set up a weaker opponent, principally because Foley did not want to lose his base and lower his own showing in the primary. R.T. 324.

The 1996 Washington presidential primary was also "perfectly positioned" for raiding: President Bill Clinton was unopposed, leaving Democrats free to cross and select the perceived weakest opponent among eight Republican contenders. Olson, J.A. at 210-213. Fortuitously, Washington was offering voters two primary ballots to choose from: a closed primary to be used by the parties in selecting delegates to the national conventions, and the state's traditional blanket primary open to all voters. This unique situation provided political scientists with a "laboratory" to directly measure crossover voting in simultaneous closed and blanket primaries under conditions conducive to raiding. *Id.* The results showed no evidence of significant crossover voting. Votes cast in the blanket primary were substantially the same as those in the primary closed to nonparty members. *Id.*

their choice). These are the "sincere" crossover voters, who have no intent to create mischief. R.T. 15-18, 56, 59, 349-350, 496-457. Further, the evidence showed that crossover voting generally does not change the outcome of elections, it merely accentuates the margin of victory. Pet. App. 31a; R.T. 488. The parties admitted that crossover voting makes little difference if it does not change the outcome of the election.[9] R.T. 234, 468.

Furthermore, crossover voting in open or even closed primary systems will actually have a more pernicious impact than in a blanket primary. As petitioners' expert Sal Russo testified, some races will have such appeal that no matter what the form of primary and what the registration requirements, voters will cross party lines for that one vote. R.T. 290 (Armenian-Americans supporting Governor George Deukmejian "would have done anything, whether it was an open primary, blanket primary. I mean, they would have been there hell or high water.") And nominally closed primary systems allowing same-day registration make such crossover voting as easy as under

[9] The District Court observed that, "in the fullness of time," it is likely some primary races will be determined by crossover voting. Pet. App. 32a-33a. However, the parties cited only three races in the past 60 years under the Alaska and Washington blanket primaries which arguably were determined by crossover voting: Washington Governor Clarence Martin in 1936, Alaska Governor J. Hammond in 1974, and Washington Governor Dixie Lee Ray in 1976. *In each instance, the nominee went on to win the general election, giving the voters their candidate of choice.* Olson, J.A. at 207-210, 213. The evidence at trial confirmed that voters generally nominate and elect their most preferred candidate.

an open primary system. Under the closed or open primary, once voters cross party lines for the one race of interest, they are *locked into the other party's ballot* for all other races. They are faced with the choice of not voting, voting for candidates about whom they have no knowledge or interest, or voting mischievously. By contrast, a blanket primary allows voters to vote their sincere choice race-by-race, regardless of party.

This Court thus has the opportunity to recognize what the evidence at trial established: crossover voting occurs in *both closed and open primaries*. Pet. App. 31a-32a; Alvarez & Nagler Report, J.A. at 162-164, 173; R.T. 239, 466; *see Burdick v. Takushi*, 504 U.S. at 449 (Kennedy, J., dissenting). Accordingly, the parties' claim that any crossover votes – votes of "outsiders" and "nonmembers" – make a primary *per se* unconstitutional would invalidate not only the blanket but the open primary and some forms of the closed primary as well.

2. The Political Parties' Arguments on Crossover Voting Would Strike Down Not Only Blanket Primaries, But Open Primaries and Many Forms of the Closed Primary.

" 'The distinctions between open and closed primaries are easy to exaggerate. Too simple a distinction ignores the range of nuances and varieties within the closed primary states.' Similarly, there are many variations within the open and blanket primary states." Opinion n.8, Pet. App. at 14a (internal citations omitted). For example, "[i]n an open primary, a registered voter may

request, on election day, the ballot for any party's primary in which the voter intends to vote, *whether or not the voter previously has registered as a member of that party*; . . . Twenty-one states have an open primary in this sense of the term." *Id.*, citing Gerber Report, J.A. 111-113 (emphasis added; Gerber Report actually refers to 23 such states). The record in this case shows that some states do not require voters to identify their party affiliation; others do not require public recordation of a partisan ballot selection; and some states give the voter a choice whether to affiliate publicly. Indeed, this Court faced the relevance of a non-recordation law in Wisconsin in *La Follette, supra.*[10]

When a state permits a voter to obtain a party's ballot but not disclose his or her party affiliation or have it recorded, the alleged "harms" that arise are identical to those the political parties allege arise from the blanket primary – the party has no way of knowing whether the voter supporting their candidate is "one of theirs." As Justice Powell noted in *Rosario v. Rockefeller*: "[c]itizens customarily choose a party and vote in its primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations," 410 U.S. 752, 769 (1973) (Powell, J., dissenting), not because they want to participate in the life of an organization. Unlike joining a private organization, voters do not have to pay dues, take an oath, attend meetings or even express agreement with certain ideals or goals. "Thus, to

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[10] At trial, the political parties complained their real fear was a primary election system which does not require *recordation* of party affiliation. R.T. 122, 139-142.

contend that Proposition 198 permits non-pa. ty members to vote in a party's primary, while accurate, covers over much of the imprecision in the political reality." Opinion, Pet. App. at 26a-27a. In open primary states, in states where voter registration is not required or recorded, and in "semi-open" and "semi-closed" states where the voter may request any ballot on the day of the primary, *see* Opinion, Pet. App. 15a n.9, essentially *any* voter may obtain *any* party's ballot on the day of the primary and "switch" parties, or cross over, with ease. Such an election system is functionally no different from a blanket primary, where a voter may make (or decline to make) that choice, on a race-by-race basis. Under these circumstances, the consequence of accepting the political parties' arguments on crossover voting jeopardizes almost all forms of primaries currently in use.

3. Proposition 198 Does Not Burden Parties' Traditional Activities.

At trial and on appeal, the political parties argued that the blanket primary severely burdens traditional party activities such as internal party governance, maintaining party discipline in the Legislature, selecting candidates, and conducting campaigns. Now, in the Petitioners' Brief, they make no mention of these burdens. The burdens were, and remain, speculative at best and not substantial in any case.

First, there is no demonstrated impact on internal party governance. Proposition 198 expressly exempts party central committee positions from the blanket primary. The parties, however, argued below that because

both the Republican and Democratic Parties currently permit their nominees to serve on and make appointments to their central committees, these governing bodies will become "adulterated" by nominees who win by virtue of outside support. Evidence refuted these claims. First, all nominees must be members of the party, § 8001, and their appointees as well. R.T. 85. Second, nothing prevents the parties from changing how their central committees are constituted. R.T. 221. Third, nothing suggests that nominees who win with crossover votes will be less dedicated to party ideals and activities. R.T. 236. Fourth, this scenario exists in the closed primary as well, where a candidate can also receive the nomination with less than majority support from party members. R.T. 75. Finally, the parties' present rules belie their objections. Those rules give candidates who win in the *general election* more appointments to the central committee *in recognition of their demonstrated ability to appeal across party lines.* R.T. 225.

Second, the political parties asserted that the blanket primary reduces the "disciplining effect" of parties upon elected officials, making it easier for members of the Legislature to break from the parties' positions on issues. R.T. 213. Yet petitioners acknowledged that even under the closed primary many elected officials, especially those from competitive districts, voted against their party leadership. R.T. 351. This is a harm only if the party has a greater claim to the candidates than do the constituents. Finally, the balance struck between party caucus discipline and permitting legislators to "vote their districts" is a question of public policy and it is not the function of any court to resolve them.

Third, the parties also claimed that the blanket primary will cripple their campaign activities. But Proposition 198 does not affect parties' participation in campaigns at all. Parties can develop platforms, register new voters, endorse candidates, provide financial support, and conduct get-out-the-vote activities on election day exactly as they could before. Opinion, Pet. App. 36a; R.T. 225. Indeed, the testimony showed that under Washington's blanket primary political parties remain strong and continue to robustly conduct all these activities. Pet. App. 36a; R.T. 527.

Fourth, the parties argued below was whether Proposition 198 will produce "false candidates" who will carry the party's label but not its politics. R.T. 365-366. But, party candidates must be party members, § 8001, and parties can endorse preferred candidates if they wish. *See Eu*, 489 U.S. at 223-224. Parties even have the power to impose certain tests on those who would run under their banners. *See Duke v. Smith*, 13 F.3d 388, 391, fn.3 (11th Cir. 1994). In any case, courts have noted that the state's interest in limiting the *candidate's* ability to switch parties is greater than any interest in limiting the *voter's* ability to switch parties. *Storer*, 415 U.S. at ___; *Pontikes v. Kusper*, 345 F. Supp. 1104, 1108-1109 (N.D. Ill. 1972). Petitioners simply failed to show how the blanket primary would increase the risk of false candidacies.

Finally, the blanket primary does not undermine the parties' ability to define their membership. In California, both before and after Proposition 198, citizens become members of parties simply by registering to vote as members of that party. §§ 2151, 7164, 7362, 7804, 8001. It is a self-designating system. At trial, no one even hinted that

the parties vet their members. Even the extremely partisan Libertarian and Peace and Freedom Parties accept as members those who register with their parties. Under the blanket primary, none of this changes.

4. Minor Parties Suffer No Special Burdens In the Blanket Primary.

Petitioners present in their brief an argument that the blanket primary imposes a particularly severe burden on the minor parties. Pet. Br. at 33-38. The principal burden identified is the support minor party candidates will receive from "nonmembers." *Id.* Indeed, it becomes clear that these parties do not welcome support from the voters, but instead wish to use the state's primary election system as a tool to conduct their internal struggles *absolutely free of any voter who sincerely decides that on election day he or she wishes to support their candidate.* Even if voters wish to support, for example, Peace and Freedom candidate X, the message from the party is that such votes are not only not welcome, but, in order to support X, voters must publicly affiliate, even against their own wishes, in the Peace and Freedom Party and severely restrict the choices available to them at the primary. The voter is given no real choice at all – precisely what Proposition 198 was designed to overcome.

It is apparent, then, that the minor parties either engage in the election process because they genuinely want to win the election, in which case, they cannot complain about support from the voters, or they engage in it for expressive purposes. In the latter case, while expressive interests are significant, they fail to rise to the

level of protected associational interests in elections. *Timmons*, 520 U.S. at 363 ("Ballots serve primarily to elect candidates, not as fora for political expression."); *Burdick*, 504 U.S. at 438 ("[T]he function of the election process is to winnow out and finally reject all but the chosen candidates. . . . Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.") (internal citations and quotation omitted). In any case, even if elections were the proper forum for expression, it is difficult to see how the minor parties' rights of expression will be harmed by more exposure, greater opportunity and broader support in a blanket primary.

Notwithstanding petitioners' claims, the harms to the minor parties alleged are speculative and insubstantial. The District Court found that nothing suggests that crossover voting will be widespread, much less have a negative effect on the minor parties or their candidates for several reasons. Pet. App. 32a n.26. First, minor parties seldom have contested primaries. In the approximately 2,000 partisan primary races in which minor parties have fielded candidates since 1968, only 102, approximately 5 percent, have been contested. Moreover, of those 102, 34 occurred in 1970 as the result of a factional dispute within the American Independent Party. R.T. 618, 630-631. Furthermore, minor parties in California field candidates in partisan elections primarily to recruit members and to spread the message of the party. There is very little likelihood of harm by sincere crossover voting, let alone raiding. R.T. at 427. The interest minor parties have in elections is largely an expressive one.

The experience of minor parties in Washington does not support the minor parties dire predictions. Before Proposition 198, California had six ballot qualified minor parties. R.T. 610. From 1988 to 1996, Washington ranged from a low of four to a high of eight – about the same number. In *Munro*, 479 U.S. at 197-198, this Court observed that Washington has a "blanket primary," where minor party candidates are free to campaign among the entire pool of registered voters. It presents no bar to "get the vote out," foster candidate name recognition, and educate the electorate. *Id.*

Finally, it is worth noting the political parties may avoid the burdens they fear. Both the major and minor parties are free to support and nominate candidates through the independent candidate approach, by using nominating petitions. § 8400 et seq. Like any private entity, they can chose their candidates by private primary, convention, caucus or any other method. *See Green Party v. Jones*, 31 Cal.App.4th 747, 755 n.9 (1995). However, if they do so, they forfeit automatic ballot access and party identification for candidates.

B. The Blanket Primary Advances Compelling State Interests.

California's voters – Republicans, Democrats, independents and others – voted overwhelmingly to adopt a blanket primary, believing it will give voters more choice, increase voter participation, make elected officials less partisan and more responsive to the voters, wrest control of government from special interest groups, and restore vigorous political competition. J.A. 89-90, 95, 104-106.

These interests, fundamental to a healthy democracy, are powerful and compelling.

Under this Court's balancing test, the state need only justify the blanket primary by showing that it advances important regulatory interests, *Timmons*, 520 U.S. at 364; *Burdick*, 504 U.S. at 434, "sufficiently weighty to justify the limitation imposed upon the Par[ties'] rights." *Timmons*, at 364. The District Court found the state's interests "need not be compelling, given that the burdens are not crushing, but they must be important." Pet. App. 37a. That court, in turn, found, "taken as a whole, the State interests that support the blanket primary are substantial, and indeed compelling." *Id.* at 42a. Of these interests, the District Court went on to say, "[i]ncreasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout *are all interests of the first order.*" *Id.* at 43a.

1. The Blanket Primary Will Produce Elected Officials Who Better Represent The Electorate.

The blanket primary advances one of the most important goals of any election process: securing the representativeness of elected officials. As this Court has long recognized, the state may regulate the election process to assure that elections effectively translate the will of the electorate. *Storer*, 415 U.S. at 732. The State may, for example, insist that candidates demonstrate a significant level of voter support before qualifying for the general election, *American Party of Texas v. White*, 415 U.S. 767, 782 (1973); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), and

require that the election process be democratic even against the wishes of the political party. *Tashjian*, 479 U.S. at 237 (Scalia J., dissenting).

Greater representativeness also helps maintain the stability of the political system. *Storer*, 415 U.S. at 736, and the state has a valid interest in preserving the integrity of the electoral process. *Rosario v. Rockefeller*, 410 U.S. at 761. But an electoral process can hardly have integrity if it does not ensure that the officials elected are representative of the people to be governed. Put simply, the less a voter staggers from election to election picking between candidates who do not reflect the voter's views, the more stable the overall political system will be. *See Rutan v. Republican Party*, 497 U.S. 67, 107 (1990) (Scalia, J., dissenting) (finding that when "each party has a relatively greater interest in appealing to a majority of the electorate and a relatively lesser interest in furthering philosophies or programs that are far from the mainstream . . . , the stabilizing effects are obvious [and] . . . splintered parties and unrestrained factionalism [that] may do significant damage to the fabric of government are avoided.").

The record demonstrates that officials elected under blanket primaries stand closer to the median policy positions of their districts than do those elected under closed primaries. Gerber, R.T. 693-696. The closed primary, by contrast, limits voters in the general election to picking among candidates selected by a much narrower subset of voters not reflective of the total electorate. By affording all voters the opportunity to consider all of the participating candidates at two points, the blanket primary generates election outcomes that are more closely aligned with

true voter preferences. *See Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) (observing that expanding choices in an election fosters the voter's ability to express political preferences). As the District Court found: "[T]he people of California agree that a blanket primary system will lead to the election of more representative 'problem solvers' who are less beholden to party officials and 'special interest groups.' " Pet. App. 41a.

Unable to deny that the blanket primary will produce candidates more representative of the electorate, the parties have characterized this virtue as a vice. According to them, candidates closer to the political fringe would be better because they provide voters a more "meaningful choice." R.T. 412-413, R.T. 561-562. But the parties confuse stark choices with meaningful ones. The parties' argument mistakenly takes the distance between the candidates themselves, not the candidates' closeness to the voters, as the measure of a healthy political system. R.T. 412, 413, 561, 562. As two of the parties' experts conceded, this view of "meaningful choice" reflects a European, not an American, model. R.T. 412, 413, 580, 581, R.T. 945. In contrast, the blanket primary promotes the fundamental principle of representative democracy that voters be allowed to vote for the candidate they actually prefer. *See United States Term Limits v. Thorton*, 514 U.S. 779, 780 (1995) (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)). Voters hope to find a candidate on the ballot who reflects their preferences on issues. *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

The blanket primary aims not to produce more "moderate" candidates, but rather candidates who are *more*

representative of the electorate. As most of the electorate lies near the center of the ideological spectrum, the more representative candidate will often appear the more moderate. However, "reflective" and "moderate" are not synonymous. The political parties' own experts pointed to numerous candidates who benefitted from crossover voting who are not "moderates": George Wallace, Eugene McCarthy, Gary Hart, Ronald Reagan, and Jerry Brown. R.T. 292-294.

2. The Blanket Primary Affords Voters More Choice.

In passing proposition 198, the voters acted on a clear understanding that the blanket primary would afford each individual voter more choice. Under a heading reading "Give Voters A Choice," the ballot pamphlet expressed in definite and comprehensible terms that the blanket primary would enable "every voter to select the best candidate for each office, regardless of party affiliation." This is a right held by "each American, not by Americans en masse." *Nixon v. Shrink Missouri Government PAC*, ___U.S.___, 120 S. Ct. 897, 922 (2000) (Thomas, J., dissenting). Each individual voter should have a full franchise in this democracy. However, as the result of the "skewing" in the closed primary process toward more unrepresentative candidates, candidates who might otherwise command majorities at the general election are unable to prevail at the primary. Thus, "voters at the general election are forced to pick among candidates none of whom is the first choice of the majority of voters." Opinion, Pet App. at 40a-41a; R.T. 255-256,

954-963, 974-975. The blanket primary, however, overcomes this impediment to full voter choice.

Astonishingly, petitioners at trial offered evidence that greater voter choice was a shortcoming. Professor Martin Wattenberg argued against giving voters more choice because it would only inure to the benefit of a small minority that "will really be able to make good use of those extra choices, and those are the people that are well educated, well informed, politically active. And those are the people that already have disproportionate power." R.T. 576. He even suggested that because of their "political ignorance," women, blacks, the poor, and the young would not be able to take full advantage of the choices provided to them by Proposition 198. R.T. 592. California's voters – including women, minorities, the poor and the young – did not share this opinion. Proposition 198, it is worth repeating, was supported by a majority of every demographic subgroup – including groupings by sex, race, age, income and education. Opinion, Pet. App. 13a.

3. The Blanket Primary Provides An Effective Vote To Disenfranchised Voters.

The blanket primary will give millions of citizens a more effective vote. California's closed primary effectively disenfranchised all independent voters and one-quarter of the State's party voters by denying them real participation in a critical step of the election process. Opinion, Pet. App. 39a-40a. At the time of trial, independents, or "decline to state" voters, were 1.5 million voters, or 11% of California's electorate; this is increased

to 14% subsequent to appeal, *see* Resp.'s Second Lodging. Others live in districts "safe" for another party. In California, a majority of congressional, state senate and assembly districts are considered safe for one party. R.T. 851-852. Thus, they could not vote in the primary in any way that mattered in deciding who would eventually represent them. This Court has noted the political disadvantages suffered by such voters in safe districts.[11] *Davis v. Bsandemer*, 478 U.S. 109, 170 (1986) (Powell, J., concurring and dissenting.)

The blanket primary also empowers party members who belong to minority parties in districts safely held by another party. Approximately one-quarter of all of California's voters fall into this category, effectively disenfranchised by having no say in the election of their governmental officials. Opinion, Pet. App. 40a; R.T. 858. The blanket primary is significant for these party members. It allows them a meaningful say in who represents them without also forcing them to abandon their political affiliation. Pet. App. 40a. Even the political parties'

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[11] It is no answer to suggest, as have the political parties, that these voters could register in the dominant party in order to gain an effective vote. Forcing voters to choose between retaining their true party affiliation (or non-affiliation) and participating in the dispositive election for most offices is simply unacceptable. Such a choice imposes a "substantial burden" on the voter. *Burdick*, 504 U.S. at 444, (Kennedy, J., dissenting) (requiring independent to register as partisan in order to participate in dispositive primary elections of the dominant party represents a "substantial burden"); *see also Bullock v. Crater*, 405 U.S. 134, 146 (1971) (unreasonable to require that candidates and voters abandon party affiliation in order to avoid primary filing fee).

experts acknowledged that the blanket primary opens up a determinative stage of the electoral process to voters who previously had no real say in the choice of their representative. Some 3.5 to 4.4 million additional voters can now participate fully in the selection of the person who will represent them in government. R.T. 239-240.

4. The Blanket Primary Increases Voter Participation.

In the last two primary elections, in 1998 and 2000, the first conducted under the blanket primary, a dramatic increase in voter participation occurred.[12] Resp.'s Second Lodging. In fact, in the March 2000 election, California experienced the highest voter turn-out in a primary election in 20 years. During the thirty years prior to the blanket primary's adoption, California had witnessed a 15-20 percent *decline* in voter participation in both primary and general elections. Mervyn Field, J.A. at 201; R.T. 658, 661-662. The evidence at trial established that the blanket primary will counteract this decline by encouraging voter participation at both stages of the election.

The political parties conceded at trial that allowing 1.5 million independent voters in the blanket primary boosts participation. R.T. 372; also Field, J.A. at 202; R.T. 658-659. So too, increasing the number of candidates and

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[12] Respondents have lodged with the Court the publicly-recorded votes in the most recent two primary elections in California conducted under the blanket primary, both occurring subsequent to the litigation in this case, namely June 1998 and March 2000. Resp.'s Second Lodging.

the competitiveness of elections will increase voter turnout. Opinion, Pet. App. 42a; *see* Field, J.A. at 202; *also* Nagler, R.T. 954. Empirical evidence confirms this prediction. Professor Gerber found that other blanket primary states exhibited the highest levels of turnout, open primary states the next highest levels, and closed primaries the lowest turnout. R.T. 682. In the 1996 congressional races, for example, California experienced a 43.90 percent turnout rate, compared to the 55.81 percent voter turnout average observed in the blanket primary states. The evidence at trial and afterward is undeniable that the blanket primary promotes voter turnout.

5. The Blanket Primary Expands Debate.

By definition, the blanket primary provides voters a wider range of choices. This, in turn, compels candidates to appeal to a larger segment of the electorate. Candidates will therefore expand debate beyond the narrow scope of partisan concerns. R.T. 858-859. Petitioners at trial did not disagree. California's experience under its first blanket primary confirms this, as evidenced by the fact that Dan Lungren, the virtually unchallenged Republican candidate for Governor, participated in unprecedented debates with the three principal contenders for the Democratic nomination. Instead, petitioners cited expanded debate as one of the *harms* of the blanket primary. R.T. 721 (Sen. Art Torres: For example, blanket primary would require Democrats to "reopen" discussion of abortion).

6. The Blanket Primary Protects Voter Privacy.

Finally, the blanket primary serves a compelling state interest in protecting voter privacy. *Heavey v. Chapman*, 93 Wash.2d 700, 705, 611 P.2d 1256, 1259 (Wash. 1980). Most closed and open primaries force voters to publicize their party affiliation, exposing voters to hostility. *Tashjian*, 479 U.S. at 215 n.5. Petitioners admit that public affirmation of party affiliation exposes one's voting habits to public scrutiny. R.T. 142. Under a blanket primary, by contrast, voters are not required to make any declaration or public statement of affiliation. They may choose to keep their political affiliation secret.

7. The Blanket Primary Promotes Fairness.

Here, the District Court found: "It is apparent that the voters of California believe that the [electoral] system is fairer when all voters, including independents and regardless of party affiliation, may participate in framing the choice of candidates at the general election." Opinion, Pet. App. at 43a. The court held the voters' belief in the fairness of the electoral process is itself a "substantial state interest." *Id.*

C. The Blanket Primary Is Narrowly Tailored to Advance the State's Compelling Interests.

Given that the blanket primary imposes only slight burdens on the parties' associational interests, the fit between it and the State's goals can be less than perfect. But, as the District Court found, here the fit is actually perfect: "[T]he fundamental goal of enhancing representativeness by providing all voters with a choice that is not

predetermined by party members alone can *only* be advanced by the blanket primary." Pet. App. 43a. (Emphasis added). A blanket primary better serves the state's goals than a typical open primary or same-day registration in a closed or semi-closed primary. In those alternatives, voters must still forfeit their desired political affiliation or forgo effective participation in the democratic process. *See Burdick*, 504 U.S. at 444. (Kennedy, J., dissenting) (such options place a "substantial burden" on voter choice); *see also Bullock v. Carter*, 405 U.S. 134, 146 (1971) (unreasonable to require candidates and voters to abandon their party affiliation in order to effectively participate in the electoral process.) In addition, neither alternative would increase the competitiveness and representativeness of elections as would the blanket primary.

Examining this precise issue, the Washington Supreme Court concluded that the blanket primary was the only way to fully accomplish the State's objectives:

> [T]he state interest in allowing voters to support the candidates of their choice in a primary can be achieved *only* by the blanket primary which allows complete voter freedom in alternating votes between parties, since an open primary, on the other hand, restricts a voter to candidates of only one party. The blanket primary is *the least drastic means available* to promote this legitimate state interest.

Heavey, 611 P.2d at 1259 (emphasis added).

In sum, the interests of the state, indeed, of the voters of California, are powerful and uncontroverted, reflecting fundamental principles of representative democracy. They were given life directly – by a vote of the people. Proposition 198 reflects the "considered judgment" of the

citizens of California. *See Gregory*, 501 U.S. at 471. The record shows they have long preferred a more open system. *See* Mervyn Field, J.A. at 198-199. Absent a "clear constitutional limitation," California is free to structure its political system to meet its "special concerns and political circumstances." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8, 12 (1982).

This Court should accord substantial deference to the *manner* in which voters have chosen to structure their electoral system. The judiciary should not second guess the people's own determination as to the *need* for action to preserve public confidence in the electoral process. *Federal Elections Commission v. National Right to Work Committee*, 459 U.S. 197, 210 (1982); *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO*, 413 U.S. 548, 567 (1973); *see also Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. at 907. This deference recognizes that the people of California are best equipped to balance "the myriad factors and traditions" in structuring the State's electoral system. *See Abrams v. Johnson*, 521 U.S. 74, 101 (1996); *Kusper v. Pontikes*, 414 U.S. 51, 63 (1973) (Blackman, J., dissenting) (States must have "elbow room" to formulate solutions for the many and particular problems confronting them in preserving the integrity of the franchise). Political theory as to the benefits of one system or another is not appropriate for judicial resolution. *Timmons*, 117 S.Ct. at 1371; *Tashjian*, 479 U.S. at 222.

Further, California's initiative is not "a right granted to the people, but a power reserved by them." *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal.3d 582, 591 (1976). It is "one of the most precious rights of our democratic process", *Rossi v. Brown*, 9 Cal.4th 688, 695 (1995), and California courts apply "a

liberal construction" to this power whenever it is challenged in order that the right not be improperly annulled. *Associated Home Builders of the Greater Eastbay*, 18 Cal.3d at 591. In a democracy, where the people are the best judges of who ought to represent them, the blanket primary powerfully reflects democratic ideals and virtue. A blanket primary is the most undiminished answer to Hamilton's call to popular election.

CONCLUSION

For the forgoing reasons, Respondents urge this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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